No. 83-261

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARSON S. GABLE, JOSEPH S. DADDONA, and THE CITY OF ALLENTOWN,
Petitioners

v.

ROGER SAMES and DENNIS TROCCOLA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR CERTIORARI

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UNITED STATES SUPREME COURT RULE 17.1

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

FEDERAL RULE OF CIVIL PROCEDURE 60(b)

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or ex-

cusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1) (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA RULE 20(g)

(g) Motions for reconsideration or reargument shall be served within ten (10) days after the entry of the judgment, order, or decree concerned.

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether, a Court of Appeals, upon a showing of exceptional or extraordinary circumstances and after weighing the issues of prejudice, the explanation for the delay in appealing and the substantiality of the rights involved, may exercise its discretion pursuant to Federal Rule of Civil Procedure 60(b) and permit a party to petition the District Court to vacate and re-enter judgment for the purposes of reviving a lost right of appeal?

COUNTERSTATEMENT OF THE CASE

Case Summary

This matter came before the Circuit Court as an appeal from what Respondents argue was a precipitous and improper granting of Petitioners' Motions for Summary Judgment and to Dismiss, by the District Court.

The Circuit Court heard argument upon the merits of the appeal indicating at oral argument that the lower court's actions were, at best, improvident. The Circuit Court also made it known, *sua sponte*, that the District Court (as well as all parties) might have erred in the conclusion that the District Court had lost its jurisdiction to the Circuit Court by reason of Respondents' timely filing of a Notice of Appeal.

After review of supplemental briefs upon that issue, the Circuit Court in fact concluded that the Respondents' Motion for Reconsideration/Reargument [under Local Rule 20(g)] should be treated as a timely Federal Rule 59(e) Motion (which acts as a supersedeas). The Circuit Court further concluded that the District Court had erred in holding that the Notice of Appeal had divested it of jurisdiction since under *Griggs v. Provident Consumer Discount Co.*, 103 S. Ct. 400 (1982) (per curium), a Notice of Appeal filed during the pendancy of a Rule 59(e) motion is deemed a nullity. Accordingly, and under all the circumstances, the Circuit Court dismissed the appeal without prejudice to the Respondents' filing of an appropriate Rule 60(b) motion in the district court, the intent of which expressly was to have that court vacate and re-enter its judgment so as to allow Respondents to appeal from the re-entered judgment.

Thereafter, the Petitioners filed a Petition for Rehearing in the Circuit Court, which was denied. This Brief In Opposition is in response to Petitioners' subsequently filed Petition For Writ of Certiorari before this Honorable Court, wherein Petitioners challenge the Circuit Court's discretionary disposition of the aforementioned procedural issue.

Proceedings Before the District Court

On March 18, 1982, Repsondents commenced an action in the United States District Court for the Eastern District of Pennsylvania. Their verified complaint alleged, *inter alia*, that they had been sergeants on the Allentown Police Force, that they had acquired their rank pursuant to the promotional policy in effect at the time of their respective promotions, that they were, at all times relevant, deserving of their rank as sergeants and that they had been demoted to patrolmen for political reasons, without prior notice or an opportunity to be heard. Jurisdiction of the District Court was pursuant to 42 U.S.C. §§1983 and 1985. Respondents also invoked the pendant jurisdiction of that court for their various state claims.

On April 8, 1982, Petitioners by their legal counsel filed a Motion to Dismiss.

While the Petitioners' Motion to Dismiss was pending, discovery had commenced. Respondents' discovery consisted of deposing Allentown Police Chief Carson S. Gable, the Mayor of Allentown Joseph S. Daddona, Assistant Police Chiefs David M. Howells, Sr. and Charles Charles, Patrolmen Thomas Fallstich and Thomas E. Kloss. Respondents also propounded interrogatories upon the Petitioners as well as a Motion for Production of Documents. The propounded interrogatories were never answered by Petitioners. Likewise, the individual requests contained in the Motion for Production of Documents were either objected to or never answered.

On or about May 20, 1982, the Petitioners moved the District Court for Summary Judgment. As the sole basis of Petitioners' Motion they alleged the denial of the existence of political motivation in their decision to demote, and, contended further that, under Pennsylvania law, the Respondents were not entitled to either advance notice nor an opportunity to be heard prior to their demotions. This Motion was made despite Petitioners' knowledge that the parties had agreed upon and sched-

uled further depositions, and with already existing discovery unanswered by Petitioners and, in fact, seriously in default.

Orders and corresponding Judgment were entered in favor of Petitioners by the District Court on June 25, 1982 *without* prior notice, *without* an opportunity for hearing or oral argument, *before* opposing affidavits could be filed, *before court-ordered* discovery was provided (to wit, *Petitioners'* Answers to Respondents' Interrogatories), and *before* more than one half of the depositions previously taken by Respondents *had even been filed* (and thus available to the court for consideration). Said Orders were also entered in obvious defiance of Pennsylvania case and statutory law declaring a police sergeant's rank to be constitutionally protected property which can only be taken away by a process which is legally due.

On July 8, 1982, Respondents, pursuant to local Rule 20(g), filed in the District Court a Motion for Reconsideration/Reargument. Because Respondents' local Rule 20(g) Motion did not act as a supersedeas and because the District Court failed to Reconsider within the thirty (30) day appeal period, Respondents filed a Notice of Appeal in that same court on July 23, 1982, the last possible day to appeal.

On August 10, 1982, Petitioners filed an Answer to Respondents' Motion for Reconsideration. Significantly, Petitioners vigorously argued that Respondents' timely filed Notice of Appeal to the Court of Appeals divested the District Court of jurisdiction.

On September 15, 1982, the District Court, per the Honorable E. Mac Troutman, entered an Order denying Respondents' Motion for Reconsideration predicated upon its conclusion that Respondents' Notice of Appeal removed Respondents from the District Court's jurisdiction to that of the Court of Appeals (page one of said Order). Judge Troutman, nevertheless went on to briefly address the issues raised by Appellants in an effort "to

assist the Court of Appeals in *its determination of the issues on appeal . . .*" (Emphasis added).

Proceedings Before the Court of Appeals

Thereafter, the substantive issues were fully briefed by both Respondents and Petitioners. The matter was orally argued on April 11, 1983, before the Third Circuit Court of Appeals.

At oral argument, the Third Circuit, *sua sponte*, raised the issue of its jurisdiction. The Court, although hearing oral argument on the substantive issues raised, requested further briefing by counsel on the jurisdictional issue. Neither Petitioners nor Respondents had previously perceived or anticipated any such issue.

Post-argument briefs were thereafter submitted to the Court below. Through these briefs, and in an obvious attempt to defeat Respondents' rights to appellate review, Petitioners reversed their previous position and argued that at all times relevant hereto, jurisdiction *was* properly vested with the District Court. Petitioners further argued that since Respondents failed to appeal from the District Court's September 15, 1982 Order denying reconsideration of its June 23, 1982 Order, Respondents' rights to further appellate review were extinguished.

On June 15, 1983, the United States Court of Appeals for the Third Circuit recognized that Petitioners were attempting to unjustly benefit from their misrepresentations to the District Court, and that the District Court had erred in concluding that jurisdiction had vested with the Circuit Court. The Circuit Court dismissed Respondents' appeal, without prejudice, and allowed Respondents "to move the District Court under Fed. R. Civ. P. 60(b) to vacate and re-enter judgment so as to allow [Respondents] to appeal from the re-entered judgment". Under the facts in this case the Third Circuit characterized this procedure as "provid[ing] a fair result for both parties".

Petitioners sought rehearing in the Third Circuit. On July 14, 1983, Petitioners' Petition for Rehearing was denied. Their *Petition for Writ of Certiorari* followed.

ARGUMENT

Summary of Argument

The June 15, 1983 Order of the Court of Appeals was a proper exercise of its discretion and does not warrant a review upon a Writ of Certiorari to this Honorable Court since it is in complete harmony with the decisions of this Honorable Court as well as all other Courts of Appeal.

Petitioners have drawn upon cases with widely dissimilar factual predicates to dissever the instant decision from its clear place in the mainstream of federal procedural practice.

At bar is a case wherein the Court of Appeals *sua sponte* raised and concluded, that the District Court erred in finding that Respondents' Notice of Appeal was efficacious. Rather, the Court of Appeals concluded that under the holding in *Griggs v. Provident Consumer Discount Co.*, 103 S. Ct. 400 (1982), the filed Notice of Appeal was premature and, accordingly, a nullity. Because Respondents justifiably relied upon the finding of the District Court and proceeded in good faith upon the prosecution of their appeal, because the *Petitioners* believed and vigorously argued that the Notice of Appeal *was* timely, because there has been no trial on the merits, because the Petitioners would not be prejudiced, and because justice required, the Court of Appeals concluded that the best procedure to produce "a fair result for both parties" was to dismiss the appeal without prejudice to Respondents' filing of an appropriate Rule 60(b) Motion in the District Court.

The Court of Appeals did not abuse its discretion but rather rendered a decision guided by accepted legal principles previously and consistently employed under similar circumstances, not only by it but, by this Honorable Court and virtually all other Courts of Appeal.

The prerequisites for invoking the exercise of this Honorable Court's power of supervision over such a

well-settled (and considerably perfunctory) procedural issue, simply do not obtain.

Settled Test Governing Review on Writ of Certiorari

As this Honorable Court is well aware, a review on Writ of Certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. U.S. Supreme Court Rule 17.1. Examples of appropriate reasons for granting certiorari include conflicting decisions of Courts of Appeal, a decision of a Court of Appeals which has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Honorable Court's power of supervision, occasions when a federal Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or when a federal court has decided a federal question in a way in conflict with decisions of this Court. U.S. Supreme Court Rule 17.1(a) and (c).

In their Petition, Petitioners urge this Honorable Court to issue its writ because "the decision below . . . seriously hampers proper and uniform administration of the rules of procedure governing litigation; and conflicts with and departs from decisions rendered by this Honorable Court, other decisions rendered by the Court of Appeals and decisions rendered by other Courts of Appeal . . ." *Petition for Writ of Certiorari*, p. 8. Upon closer examination and for the reasons which follow, it is abundantly clear that the Third Circuit's Opinion *is* consistent with the law of the various circuits and with decisions rendered by this Honorable Court.

Exercise of This Honorable Court's Power of Supervision Unwarranted

The instant application for review upon a Writ of Certiorari is the last in a protracted series of Petitioners' ill-conceived attempts to avoid having Respondents

cause of action heard upon the merits and, in no way approaches the "special and important reasons" threshold established for review by this Honorable Court. United States Supreme Court Rule 17.

At the heart of this matter is the Court of Appeals' reference to Fed. R. Civ. P. 60(b).

Relief from judgment after the appeal time has expired is governed by Fed. R. Civ. P. 60(b). Under subdivisions (b)(1) - (b)(5) of this rule, the District Court undoubtedly has the power to vacate a judgment in appropriate circumstances and rehear the case, and the judgment entered after rehearing is appealable in due course, though it may be in substance the same as the first. 9 *Moore's Federal Practice* ¶204.13(5). Fed. R. Civ. P. 60(b)(6) permits relief from judgments for "any other reason justifying relief from the operation of the judgment". It has been written that in extraordinary circumstances, Fed. R. App. P. 4, while absolute in its terms prescribing time for appeals, should be read as having no affect upon the limited class of cases that fall within Fed. R. Civ. P. 60(b)(6). *Id. See generally*, 7 *Moore's Federal Practice* ¶60.27(2).

This Honorable Court, as well as a majority of the Circuit Courts of Appeal, has expressly stated or implied that as long as circumventing the impact of Fed. R. Civ. P. 77(d) is not the *sole* reason for seeking relief pursuant to Fed. R. Civ. P. 60(b), Rule 60(b) may be used to avoid the restrictive measure of Fed. R. App. P. 4(a) upon a showing of compelling, exceptional or extraordinary circumstances. *Klapprott v. U.S.*, 335 U.S. 601, 93 L.Ed. 266, 69 S.Ct. 384 (1949); *Hensley v. Chesapeake & Ohio Railway Co.*, 651 F.2d 226 (4th Cir., 1981); *Fidelity & Deposit Co. v. Usaform Hail Pool, Inc.*, 523 F.2d 744 (5th Cir., 1975) *cert. denied* 425 U.S. 950, 48 L.Ed.2d 194, 96 S.Ct. 1725 (1976); *International Controls Corp. v. Vesco*, 556 F.2d 665 (2nd Cir., 1977) *cert. denied* 434 U.S. 1014, 54 L.Ed.2d 758, 98 S.Ct. 730 (1978); *Braden v. University of Pittsburgh*, 552 F.2d 948 (3rd Cir.,

1977); *Kramer v. American Postal Workers Union, AFL-CIO*, 556 F.2d 929 (9th Cir., 1977); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147 (1st Cir., 1980); *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir., 1970); *Vasquez v. Brezenoff*, 93 F.R.D. 583 (1982).

As stated by the First Circuit:

> . . . [I]n proper cases Rule 60(b) has been taken to authorize motions to vacate and re-enter judgments for the purposes of reviving a lost right to appeal. *Buckeye Cellulose Corp. v. Braggs*, 569 F.2d 1036, (8th Cir., 1978), *Fidelity & Deposit Co. v. Usaform Hail Pool, Inc.*, 523 F.2d 744 (5th Cir., 1975) *cert. denied* 425 U.S. 950 (1976); *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, 163 U.S. App. D.C. 140, 500 F.2d 808 (D.C. Cir., 1974); *Smith v. Jackson Tool & Die Co.*, 426 F.2d 5 (5th Cir., 1970); *Braden v. University of Pittsburgh*, 552 F.2d 948 (3rd Cir., 1977)[;] any such motion would have called for an exercise of a judicial discretion that weighed the issues of prejudice, the explanation for the delay in appealing, and the substantiality of the rights involved. *Scola v. Boat Frances, R., Inc.*, 618 F.2d at 152.

When viewed in the light of the three (3) factors outlined in *Scola v. Boat Frances, R., Inc., supra*, the Third Circuit's judgment was a sound exercise of judicial discretion that should not be the subject of review by this Honorable Court.[1]

Significantly, Petitioners have not suggested that the subject Order prejudices them in any way. Cer-

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1. Just last term, two Justices of this Honorable Court recognized that Courts of Appeal have the authority in certain, extraordinary circumstances to permit an appellant to ask the District Court to vacate and re-enter its judgment so as to permit a timely appeal. *James v. United States*, ____ U.S. ____, 74 L.Ed.2d 615 (1982). Justice Brennan characterized this procedure as being in the Courts of Appeal residual appellate jurisdiction. 74 L.Ed.2d at 616, footnote 6.

tainly, it has not subjected them to "loss of proof". *McCawley v. Fleishmann Transp. Co.*, 10 F.R.D. 624 (S.D. New York 1950), *U.S. v. Karahalias*, 205 F.2d 331 (2nd Cir. 1953). The substantive issues here involved have already been fully researched, briefed and argued. Prior to the April 11, 1983 argument before the Third Circuit, it was conceded by Petitioners that jurisdiction was with said Court. The Third Circuit has indicated that the parties may use the same briefs and, in the event the District Court vacated and re-entered judgment, the subsequent appeal has been ordered expedited. Therefore, there would be no additional cost or passage of an undo length of time.

Similarly, the equities in the explanation for the delay in appealing weigh with Respondents. Petitioners either negligently or fraudulently misrepresented to the District Court that by virtue of the July 22, 1982 Notice of Appeal said Court no longer had jurisdiction to hear the matter. At that time, Petitioners contended that jurisdiction had vested with the Third Circuit. The District Court was persuaded and, expressly held that it was without jurisdiction and that the matter was properly before the Third Circuit. The Third Circuit, exercising its judicial discretion and supervisory powers, concluded that Petitioners should not now be permitted to benefit from their misrepresentations to the District Court. Likewise, the Third Circuit concluded that Respondents' failure to file a new Notice of Appeal was justified by their reliance upon the District Court's erroneous conclusion that the previous Notice of Appeal was viable and that jurisdiction was properly with the Third Circuit. Where subsequent events [here, the Court of Appeals equating Respondents' local Rule 20(g) Motion to a Fed. R. Civ. P. 59(e) Motion and thereby declaring the Notice of Appeal a nullity] make it unjust to deny Rule 60(b) relief, the Court of Appeals has not previously hesitated to intervene. *Kelly v. Greer*, 334 F.2d 434 (3rd Cir., 1964). After weighing the aforesaid factors against

the general policy of finality of judgments, the Third Circuit exercised its discretion in favor of Respondents' right to have matters affecting their substantial rights heard on the merits.

Petitioners contend however that, the foregoing notwithstanding, the compelling circumstance which occasioned the instant omission (i.e., Respondents' failure to file a new Notice of Appeal) do not rest with the District Court and were not substantially contributed to by Petitioners. According to Petitioners, "The District Court never opined on the validity of Respondents' Notice of Appeal . . ." *Petition for Writ of Certiorari*, page 15.

This statement is pure sophistry. Since an *un*timely appeal would not divest the District Court of jurisdiction, implicit in the court's conclusion that it *was* divested of jurisdiction is the conclusion that the Notice of Appeal *was* timely.

Judge Troutman specifically held, in pertinent part, as follows:

> . . . On July 22, 1982, Plaintiff filed a Notice of Appeal which *divested this Court of jurisdiction to consider the instant motion*. This rule enjoys a long history of acceptance, *Hovey v. McDonald*, 109 U.S. 150, 157 (1883), and remains undiluted by the passage of time. *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F.2d 275, 27677 (3rd Cir. 1962). Indeed, the Third Circuit considers the rule "well settled". *Securities & Exchange Commission v. Investors Security Corp.*, 560 F.2d 561, 568 (3rd Cir. 1977). However, because we retain "limited authority to . . . assist the Court of Appeals . . . in its determination" of the issues on appeal, *Id.*, we briefly address the issues raised by Plaintiff's motion. Order of September 15, 1982, p. 1, *Petition for Writ of Certiorari*, p. A-14. (Emphasis Added)

Petitioners also fail to mention that the District Court's holding came on the heels of the following argument made by Petitioners, quoted directly from the opening paragraph of their Memorandum of Law in Opposition to (Respondents') Motion for Reconsideration:

> It is a general rule that the filing of a *timely* and sufficient Notice of Appeal *effectively transfers jurisdiction from the District Court to the Court of Appeals* with respect to any matter involved in the appeal. It divests the District Court of jurisdiction to proceed further in the matter *except in aid of the appeal* . . .
>
> . . . Accordingly, this Court based upon [Respondents'] *timely Notice of Appeal filed with the Court of Appeals*, should dismiss [Respondents'] Motion for Reconsideration and Reargument because of lack of jurisdiction. (Citations Omitted, Emphasis Added).

Though unmentioned in the written Opinion of the Court of Appeals, other factors clearly present in the instant case which have historically mitigated in favor of applying Rule 60(b)(6) include the fact that there has been no trial on the merits [*Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209 (1950)], that the moving party has shown a meritorious claim [*Sebastiano v. United States*, 108 F. Supp. 278 (N.D. Ohio, 1951)], and the fact that the proper exercise of the court's discretion should ordinarily incline towards granting rather than denying Rule 60(b)(6) relief. *In re: Estate of Cremidas*, 14 F.R.D. 15 (D. Alaska, 1953).

Petitioners' Citations Inopposite

Petitioners cite several cases as authority for their argument that the instant decision of the Court of Appeals departs from prevailing federal practice. Even the most cursory review of those cases will quickly reveal

that they are easily distinguished from the case at bar.[2] Each is conspicuously without a single extenuating circumstance inviting, inducing or accounting for the invalidity of the filed appeal. Nowhere has Petitioner sought to compare the consequence of those litigants' own lack of diligence with the conduct of Respondents within. We are not talking about a standardless residual discretionary power to set aside judgments, but rather, "a grand reservoir of equitable power to do justice in a particular case. . ." 7 *Moore's Federal Practice*, ¶60.27(2) at pp. 375-76 and the cases thereunder quoting *Treatise*.

Petitioners' Other Arguments Irrelative And/Or Unfounded

Any connection between Petitioners' remaining arguments and the issue of whether or not the instant matter warrants review by our highest court, appears purely accidental.

Though not easily discerned from Petitioners addlepated argument, their first contention appears to be simply that Fed.R.App.P. 26(b) prohibits the operation of Fed.R.Civ.P. 60(b). That Petitioners fail to cite a single case for such a proposition is understandable, since these two rules have operated harmoniously since their inception.

Petitioners also argue, in passing, that Respondents' Rule 60(b) Motion was untimely in that "more than one (1) year has passed since the District Court's June 25, 1982, Order was entered." *Petition for Writ of Certiorari*, p. 14. This is simply untrue.

Petitioners' Rule 60(b) Motion was made and served on June 24, 1983. Even though Rule 60(b)(6) has no one (1) year limitation, the District Court is free to

2. The oft-cited *Griggs* case for example, did not, as Petitioners contend, emasculate Rule 60(b)(6). In fact, it did not even contemplate the rule since *Griggs* dealt with an instance of pure "inadvertance" and not "compelling circumstances".

choose from among the other sub-sections since the reasons urged justify relief upon several grounds, and since the Motion was made within a reasonable time [nine (9) days after the Court of Appeals' Order of June 15, 1983] and within one (1) year of both of the District Court's Orders of June 25, 1982 and September 15, 1982.

Finally, Petitioners admit that the Opinion of the Court of Appeals may justifiably rest upon "unique" or "extraordinary" circumstances, *Petition for Writ of Certiorari*, pp. 12 and 15, but they nonetheless argue that the Court of Appeals concluded that there were none here presented. Again, Petitioners display a disaffection toward the written word. The Court of Appeals simply and distinctly concluded that in the presence of compelling Rule 60(b) factors, they need "not consider whether this case involves 'unique circumstances' such as those recognized by the Supreme Court in *Thompson v. INS*, 374 U.S. 384 (1964) (per curium). "*Petition for Writ of Certiorari*, p. A-6.

In sum, one can only conclude that Petitioners misperceive the nature of the judgment of the Third Circuit in the instant case. After raising the issue *sua sponte*, the Third Circuit concluded that it did not have jurisdiction to proceed in this matter, yet in the interest of substantial justice, exercised its discretion due to the compelling reasons presented and concluded that Respondents were entitled to seek relief pursuant to Fed. R. Civ. P. 60(b). As evidenced by the afore-cited cases, this form of relief is available in virtually every Circuit and, while this Honorable Court has stated that extraordinary circumstances should rarely be found, *Ackermann v. U.S.*, *supra*, this Honorable Court has nonetheless utilized this procedure on occasion to promote the interests of justice. See *Klapprott v. United States*, 335 U.S. 601, 93 L.Ed.266, 69 S. Ct. 384 (1949). The appropriate question is therefore, not whether the Third Circuit can do indirectly what it cannot do directly, but rather, whether the Third Circuit abused its

discretion in concluding under the facts of this case, that compelling reasons were present entitling Respondents to relief pursuant to Rule 60(b). *Perrin v. Aluminum Co. of America*, 197 F.2d 254 (9th Cir. 1952).

Try as they may, Petitioners cannot in the fact that Rule 60(b) has been consistently and historically "liberally applied to accomplish justice". 7 *Moore's Federal Practice*, ¶60.27(2). Try as they may, they cannot ignore the fact that it was *their* misrepresentation which prompted the District Court's error which was at the heart of this (now) justiciably corrected imbroglio.

CONCLUSION

By this writ, Petitioners seek to have this Honorable Court review the Court of Appeals' discretionary grant of relief to Respondents pursuant to Fed.R.Civ.P. 60(b).

While Petitioners boldly allege that the aforesaid decision "charts" and/or "maps" a new course, it is clear that they are viewing the wrong polestar. They have failed to cite a single case, at any level, which is at variance with the decision of the Court of Appeals.

The opinion and judgment of the Court of Appeals was the result of a well-reasoned approach that balanced the desirable general policy of finality of judgments against the factors of prejudice to Petitioners, the explanation for Respondents' delay and the substantial rights of the parties. The analysis and conclusion of the Third Circuit resulted in an exercise of sound judicial discretion that, under the facts and circumstances presented, including the District Court's jurisdictional misinterpretation, should not be disturbed. There exists no conflict either between the Third Circuit's judgment and the decisions of this Honorable Court or, between the Circuit Courts of Appeal, on the issue presented. Therefore, Respondents respectfully request this Honorable Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully Submitted,
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